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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 970

DAVID CRYSTAL, INC.,

Respondent,

—against—

THE CUNARD STEAM-SHIP COMPANY LIMITED,

Respondent,

—against—

JOHN T. CLARK & SON,

Petitioner,

—and—

PENSON & COMPANY,

Respondent.

BRIEF OF RESPONDENT, DAVID CRYSTAL, INC., IN OPPOSITION TO PETITION FOR A WRIT FILED BY PETITIONER, JOHN T. CLARK & SON

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Statement

Five points are raised by petitioner Clark in its petition for a writ. Each is answered separately herein to the extent that it involves libellant, Crystal.

Petitioner Clark's Point 1

Petitioner Clark's first point in its petition deals with the construction of the contract between it and Cunard. Libellant, Crystal is not involved in that controversy. Accordingly, that point is not replied to by libellant here.

Petitioner Clark's Point 2

Petitioner Clark's Point 2 deals with the scope of employment of Segarra, Penson's employee, who took the delivery order and a blank form and delivered them to the truckmen who then made up the spurious delivery order and then picked up the cases from the pier.

The District Court found that Segarra's act in taking the delivery order was outside the scope of his employment, stating:

> "What is controlling is that his act of abstracting the valid delivery order from Perez' desk was not within the scope of his employment.
>
> Furthermore, the document which Segarra abstracted was not the one used to obtain delivery."
>
> (Crystal Appendix, Page 32)

The Court of Appeals also gave detailed and careful consideration to the question of scope of employment and concluded that Segarra's act in taking the order and blank form and giving them to the truckmen was not within the scope of his employment. In so concluding, the Court of Appeals stated:

"As we read the record, Segarra's authority to prepare and sign delivery orders and hand them to truckmen did not extend to the commercial shipment involved in this case. Segarra was allowed to take delivery orders from Perez' desk but only for temporary use in answering inquiries and not for delivery to truckmen. While it is true that by trusting Segarra to this limited extent Penson may have facilitated the plot, we are unwilling to stretch the tenuous line of causation and say that Penson 'proximately caused' the misdelivery. See Saugerties Bank v. Delaware & Hudson Co., 236 N.Y. 425 (1923). Similarly, despite Segarra's authority to take the blank form, it seems clear that this authority did not extend to completing the form; a forgery by a mere custodian of documents is not binding on the principal. See, e.g., Ehrich v. Guaranty Trust Co., 194 App. Div. 658, 186 N.Y. Supp. 102 (1921), aff'd, 233 N.Y. 637 (1922); Manhattan Life Ins. Co. v. Forty-Second Street & Grand St. Ferry R.R. Co., 139 N.Y. 146 (1893).

A sound reason stands behind our holding that Segarra was not acting within the scope of his employment in the circumstances present here. If an employer were to be held liable every time an employee took advantage of a general authority to move freely about his offices, he would be placed in the role of an absolute insurer without the ability to protect himself. Instead, the law limits vicarious liability to situations where the wrongdoing can be traced to abuse of a more carefully defined authority. Here, it is clear that Segarra's actions were not sufficiently related to

> his delegated authority and for that reason Penson cannot be charged with responsibility for the misdelivery." (Crystal Appendix, Pages 54-55)

The conclusion reached by the District Court and the Court of Appeals on this question is fully supported by the facts and could never be said to be clearly erroneous. It is not argued by Petitioner Clark that it is.

What Petitioner Clark argues is that the opposite conclusion might have been reached and that this Court should so construe the facts so as to reach that opposite conclusion. This Court cannot be called upon to retry that fact issue.

Petitioner Clark's Point 3

Petitioner Clark argues in this point that Cunard had made a proper delivery of the cases to libellant Crystal. This was an issue between Cunard and Crystal and one not involving Clark. Cunard has not petitioned for a writ and is not challenging the finding in the District Court and the Court of Appeals that a proper delivery was not made. Nor does Cunard or Clark argue here that their status at the time of the actual physical misdelivery of the cases by Clark was not that of a bailee.

The District Court concluded the status of both Cunard and Clark at the time of the misdelivery to be simply and merely that of a bailee (Crystal Appendix, Page 18).

The Court of Appeals reached the same conclusion (Crystal Appendix, Page 51).

Both Courts concluded that their liability as bailee was absolute for a misdelivery.

Again, Petitioner Clark argues here that the Courts below might have reached an opposite conclusion on the facts and asks this Court to retry the facts and come to some opposite conclusion.

In no one of the authorities referred to by Petitioner Clark in this point had the status of the carrier developed into and become, as here, that of a bailee. And, particularly distinguishing the fact situations in those authorities from that in the present case is the fact of actual, physical misdelivery. Not a theft. But an actual physical handing over of the cases to the wrong person by Clark while acting in its capacity of agent for Cunard.

These distinguishing features makes it entirely clear that there is no conflict in the holding in the present case with that in the authorities cited by Petitioner Clark.

Petitioner Clark's Point 4

In its Point 4 Petitioner Clark argues that the physical misdelivery of the cases by it should be characterized as a theft rather than a misdelivery and the carrier, Cunard, thereby relieved of liability for the misdelivery by reason of the bill of lading provisions.

The District Court and the Court of Appeals both rejected this suggestion in sound and conclusive reasoning.

So concluding, the District Court stated:

> "The goods in question here were lost by reason of a misdelivery, and not by reason of a theft or burglary." (Crystal Appendix, Page 20)

And, the Court of Appeals in affirming this holding soundly reasoned:

> "Cunard was therefore absolutely liable for the misdelivery unless (a) certain bill of lading provisions not yet considered eliminated or reduced such liability or (b) the misdelivery was induced by Crystal or Penson, acting in its behalf. One of these provisions, the exception for acts of 'thieves,' seems to us inapplicable because the loss of the cargo here is more appropriately characterized as due to misdelivery rather than theft. It is true that under New York law a taking by false pretenses is larceny, Penal Law §1290, but we do not believe that the broad definition of theft in the criminal law should be extended to a commerical contract. See Freedman v. Geo. W. Bush & Sons Co., 284 Pa. 16 (1925). The law already recognizes this distinction for a warehouseman is absolutely liable for misdeliveries but is responsible in trespassory theft cases only where he has been negligent. See North American Smelting Co. v. Moller S.S. Co., 204 F. 2d 384 (3d Cir. 1953). These differing standards are based on sound policy considerations since it is proper that a warehouseman should bear a

greater responsibility for being duped by false pretenses than for thefts that cannot be avoided despite the exercise of ordinary care." (Crystal Appendix, Pages 52-53)

Petitioner Clark's Point 5

In this point Petitioner Clark argues that the liability of Cunard to libellant should have been limited to twenty pounds per case by reason of bill of lading provisions.

This issue was one between libellant Crystal and Cunard. It did not involve Petitioner Clark. But had it, the reasoning of the Courts below in rejecting this contention would have been the same.

The District Court held:

> "* * * Cunard seeks to limit its liability to $500.00 per package under COGSA or to £20 as set forth in the bill of lading. Since neither COGSA nor the bill of lading was applicable at the time of the misdelivery, Cunard cannot avail itself of either limitation clause and stands liable for the full value of the libellant's loss. Cf. Oliver Straw Goods Corp. v. Osaka Shosen Kaisha, 47 F. 2d 878 (2 Cir.), cert. denied, 283 U.S. 856 (1931); The Bellingham, 49 F. 2d 442 (D.N.J. 1931), rev'd on other grounds, 57 F. 2d 1015 (3 Cir. 1932)." (Crystal Appendix Pages 33-34)

And the Court of Appeals, in rejecting Petitioner's contention, again soundly reasoned:

"Cunard's attempt, elsewhere in the bill of lading, to limit its liability to £20 per package also must fail. This clause was clearly void while the goods were at sea, for the Carriage of Goods by Sea Act (GOGSA), 46 U.S.C. §1304(5), does not permit limitations under $500. It seems to us that once the law declared this clause void it should remain void forever. It would be unfair to permit the void clause to spring to life once the goods reached land, for by then Crsytal had justifiably relied on the clause's inapplicability in making its decision on adequate cargo insurance. Moreover, the limitation provision in the bill of lading does not explicitly cover post-arrival damage. Furthermore, the £20 limitation, when contrasted with COGSA's $500 figure, is such an arbitrarily small sum that it should be void as contrary to public policy. Cf. Isbrandtsen Co. v. United States, 201 F. 2d 281 (2d Cir. 1953)."

(Crystal Appendix, Page 53)

Petitioner Clark refers to three decisions in this point. Two of these decisions were rendered prior to the enactment in 1936 of the Carriage of Goods by Sea Act, referred to above by the Court of Appeals. *Georgio* v. *Rheinstrom Co.*, 294 U.S. 494 was decided in 1935. *Frederick Leyland & Co.* v. *Hornblower*, 256 Fed. 289 was decided in 1919. Whatever authority these decisions had, ended with the enactment of the Carriage of Goods by Sea Act in 1936. From that date on any limitation in a bill of lading of less than $500.00 per package or case was invalid.

The third and only other authority referred to by

Petitioner Clark, under this point, *Isbrandtsen Co.* v. *U.S.*, 201 F. 2d 281, involved loss to cargo while still aboard the carrying vessel. The Carriage of Goods by Sea Act can apply in such circumstances. But that Act does not encompass a loss occurring after discharge of cargo from a vessel such as is involved here.

> Carriage of Goods by Sea Act, 46 U.S.C., Sec. 1301(e) (1936).

The *Isbrandtsen* case, accordingly, is also readily and clearly distinguishable on its facts from the present case.

Further, the bill of lading provision involved here did not apply to loss after discharge. The Court of Appeals readily recognized this, stating:

> "* * * Moreover, the limitation provisions in the bill of lading does not explicitly cover post-arrival damage." (Crystal Appendix, Page 53)

CONCLUSION

It is submitted that in the circumstances here the granting of certiorari to the petitioner Clark is not warranted.

Respectfully submitted,

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